NO. 00-5122

NO. 00-5213

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

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UNITED STATES OF AMERICA,

APPELLEE,

VERSUS

MICROSOFT CORPORATION,

APPELLANT.

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STATE OF NEW YORK, EX REL., ET AL.

APPELLEES,

VERSUS

MICROSOFT CORPORATION,

APPELLANT.

----------X

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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# AMICUS CURIAE BRIEF OF THE ASSOCIATION FOR OBJECTIVE LAW IN SUPPORT OF DEFENDANT MICROSOFT CORPORATION AND IN SUPPORT OF REVERSAL OF THE JUDGMENTS BELOW

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## CORPORATE DISCLOSURE

Pursuant to FRAP Rules 26.1 and 28, and Circuit Rules 26.1 and 28, Amicus curiae hereby declares that it does not have any parent company or companies, and no public company or companies has any ownership interest, of 10% or greater, in it.

THE ASSOCIATION FOR OBJECTIVE LAW ("TAFOL") is a Missouri-chartered non-profit corporation with lawyer and non-lawyer contributors in many countries, whose purpose is to advance Objectivism, the philosophy of Ayn Rand, as the basis of a proper legal system.

Amicus curiae: The Association for Objective Law

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Note: The Center for the Moral Defense of Capitalism ("CMDC") discontinued its support for the project of submitting this brief jointly, which is being submitted on behalf of TAFOL.

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/S/ ROBERT S. GETMAN, ESQ.

## CERTIFICATE OF COMPLIANCE

Pursuant to FRAP Rule 32(a)(7)(C), and Rule 32(a) of the Circuit Rules of this Court and this Court's Orders of September 26, 2000 and October 3 and 17, 2000, I hereby certify that this brief complies with all style and length requirements, being set in 12 point type, with all margins at least one inch, and with those sections of its content which require page numbers not exceeding 25 pages in total, and is being served and filed in ".pdf" file and in paper format.

/S/ ROBERT S. GETMAN, ESQ.

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## INTEREST OF AMICUS CURIAE, AND INTRODUCTION

The Association for Objective Law ("TAFOL") is a Missouri-chartered non-profit corporation whose purpose is to advance Objectivism, the philosophy of Ayn Rand,[1] as the basis of a proper legal system.

Objectivism's ethics is based on the virtue of selfishness, of rational self-interest. Its political consequence, protecting self in society, is the absolutism of individual rights, including the right to property necessary to implement mens' right to life. It holds that each man has the right to complete control of his property so long as he does not violate another man's individual rights by direct physical force or the indirect force of fraud. For every man is the owner of his own life, the ultimate "monopolist" of the ultimate "monopoly". Business – voluntary production and trade – is, in a free society, the most important way every man exercises his rights and furthers his life and values.

Production and trade are the antithesis of force and violation of others' rights. Antitrust's key term, "restraint of trade" entails a flat contradiction in terms, calling a contract – a voluntary trade – a "restraint" of trade. The wrong supposedly addressed by antitrust, so-called "economic power" is a misnomer, involving not force but its opposite, choice by consumer and producer alike which is free regardless of how "hard" a bargain either side feels the other has obtained. And "monopoly power", another antitrust shibboleth at stake in this case, said to consist of power to "control" prices and "exclude" competition, on the one hand improperly makes a legal wrong out of the right to price one's own property, and on the other falsely equates production of a vastly popular product in this case with "forcing" competitors out of business, evading the difference between the impossibility of competition (e.g. against a government established monopoly born of force of law) and the mere lack of competitors at a given time.

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[1] Ayn Rand once was asked if she could summarize the essence of Objectivism while standing on one foot. She did, as follows: "1. Metaphysics: Objective Reality. 2. Epistemology: Reason. 3. Ethics: Self-Interest. 4. Politics: Capitalism." A. Rand, "Introducing Objectivism" (1962), reprinted in L. Peikoff (ed.), "The Voice of Reason" (1990) at 3. Note that TAFOL does not act as a spokesman for Objectivism and the views expressed herein are TAFOL's.

Amicus' philosophy holds that proper government is the limited government established by our Founding Fathers, in which sovereign citizens retain a reservoir of rights, as our Ninth Amendment declares, while the government is strictly limited – subordinating might to rights. It holds that the sole function of government is to protect individual rights. And that government properly does so only by objective laws, i.e. laws which "[i]n regard to derivation [are] tied to reality by man's only means of knowing reality: reason [and] [i]n regard to form have a firm, stable knowable identity,"[2] so that they may truly inform men of the law and the nature and cause of the accusations (to use the 6th Amendment's words) they will face if they disobey it. If, as is appropriate, ignorance of the law is to be no excuse, a crucial obligation of government is to make only laws which are comprehensible to the citizens. Only such a government is truly a civilized government, where the law-abiding can know the laws – and a government of laws and not of men, embodying another core American principle.

In stark contrast, antitrust is based on the opposite premises: self-sacrificial altruism, collectivism, and non-objective law. It is modeled upon sacrifice in that it demands that some men (such as producers) must ultimately be held to sacrifice themselves and live for the sake of others (such as "consumers"). It is collectivist in its view that individual rights may be overridden by the supposed interests of a collective (such as overall "economic efficiency" or "consumers" or "society"). Further, antitrust "laws" are actually lawless, paradigms of non-objective law that not only deprive man of his right to life and property but do so by a morass of incomprehensible statutes whose ambiguities are multiplied by a mountain of case-by-case precedent which no man, even with an army of lawyers, can comprehend before he acts, rather than ex post facto.

The antitrust "laws" are thus a veritable algorithm for violating individual rights and a tragic inversion of the function of government and law. Especially in an alleged "monopolization" case such as this, they punish with draconian severity those so-called

[2] H. Binswanger, "What is Objective Law", "The Intellectual Activist" v. 6 #1 (1/92) at 9.

monopolists who are deemed, under vague and shifting standards, to be "too successful" in free trade, thus depriving them of Equal Protection of the Laws. And particularly in this divestiture case, that spawned numberless punitive triple damages follow-on cases, these "laws" are the corporate equivalent of a "cruel and unusual" capital punishment by being drawn-and-quartered plus by a death by a thousand cuts of "excessive fines", to use the words of the 8th Amendment.

These grievous inherent faults of antitrust "law" have been compounded in this case by injustices in implementation, pre-trial, at trial and post-trial. Even before trial, after repeated investigations resulted in an agreed-upon "consent decree", which solemnly told Microsoft what it could legally do, on the eve of a major nationwide "Windows" product launch the federal government rushed to court and got what this Court found to be a mistaken injunction issued – without any request -- by the trial judge based on governmental misreading of the decree. Then the trial judge, over Defendant's objections, proposed to appoint a "Special Master" – worse, one arguably biased against Defendant -- to try the case, which imposition of a "surrogate judge" this Court compared to a "Potemkin jurisdiction [which] mocks the party's rights"[3] – and voided the appointment.

We respectfully submit that the Microsoft antitrust prosecutions amount to an unprecedented denial of due process of law in a rush to judgment – a judgment that somehow embraced virtually 100% of the Plaintiffs' assertions, after several severe deprivations of Defendant's necessary pretrial discovery and trial preparation time. Trial lawyers know that such discovery and preparation time is vital; they are life-threatening in a complex "bet the company" case like this where the charges Defendant faced, amorphous to start, were allowed to morph, morphing the already amorphous into a Kafkaesque trial. After such a trial, having accepted virtually uncritically the governments' morphed accusations and theories of liability, the trial court further deprived Defendant of due process by rushing to a remedy judgment without discovery and public testimony and hearings, and imposing virtually the severest imaginable

[3] United States v. Microsoft, 147 F.3d 935, 954 (D.C. Cir. 1998).

"remedies", amounting to corporate capital punishment. Worse, all this was presided over by a Judge who gave unprecedented public interviews, skirting the edge of legal ethics, putting himself in a position in which it may well be improper for him to continue to preside, unnecessarily complicating further the fate of this already fantastically complex case. And worse still, the Judge admitted that Microsoft's "intransigence" in its legal defense was a key factor in imposition of the divestiture penalty.[4] This injected a perilous new principle: the more strongly a presumptively innocent defendant insists on his innocence and stands by his belief, the increased price of a lawful defense will be a more terrible punishment. If antitrust now punishes integrity, self-esteem and pride themselves, then it is Microsoft that is innocent and the law that is guilty.

As shown in this brief, the principles of Objectivism include the same principles which are the base of our Republic and its legal system. The majority of our arguments were not made in the below nor do we expect them to be made by any other amici, nor have they been made by Defendant itself. They are unusual in that they are an "abolitionist" view of the antitrust laws a radical view which is firmly premised in the fundamental philosophical principles of the United States, its Declaration of Independence, and its state and federal Constitutions, a view which TAFOL hopes will help this Court come to a just and American result in this case.

## ARGUMENT

### The Charges in Brief

After a panoply of amendments to Plaintiffs' complaints and changes in their theories of liability, the principal charges against Microsoft in this case, under federal antitrust law and parallel state statutes became:

> Microsoft allegedly violated §1 of the Sherman antitrust act (15 U.S.C. §1 (1994)) by "technological tying" of its internet worldwide-web browser software "Internet Explorer" to its computer operating system software, "Windows95", despite Microsoft's contention that a prior consent decree allowed this practice;

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[4] See, e.g., Greg Store, "Microsoft Judge Blames Company 'Intransigence' for Breakup", Bloomberg, Sept. 29, 2000.

Microsoft violated §2 of the Sherman antitrust act (15 U.S.C. §2 (1994)) by maintaining a "monopoly" in the "relevant market" for "Intel-Compatible PC Operating Systems"

by "technological tying",

by original equipment manufacturer ("OEM") and other agreements,

by refusal to pre-disclose technical information on "Windows95" to Netscape Corporation, a competitor of Microsoft's as a maker of browser software,

by "predatory pricing" and other assorted conduct;

Microsoft allegedly violated §2 of the Sherman antitrust act by "attempted monopolization" of the "relevant market" for internet worldwide-web browser software;

Microsoft allegedly violated §1 of the Sherman antitrust act by various "exclusive dealing" arrangements; and

Microsoft allegedly violated §1 of the Sherman antitrust act by "restraining trade" though OEM licenses restrain trade, e.g. despite Microsoft's contention that its Copyright rights under the Constitution and federal statute allowed this practice.

We respectfully submit that even assuming arguendo these hotly contested allegations were true, all of these practices are within Microsoft's rights. In sum, even assuming for argument's sake the facts alleged, Microsoft should be found innocent as charged.

Observe that many of the accusations concern ordinary and legitimate business practices. How many times do you find a second product, often a free sample, packaged with what you buy. The perceived evil of "tying" was: the buyer was supposedly "forced" to buy a second, unwanted product. Was the free sample "forced" on you? Did it wreck "competition", or is it a form of competition? Microsoft's "Internet Explorer" browser was included "free" with "Windows95" and can quite strongly be argued to be an "integrated" "feature" rather than a separate "product" as this Court earlier ruled.[5] If not, this Court well knows the hair-splitting arguments trying to distinguish between a "feature" and a separate "product" and judicial difficulties in defining the highly technological issue of "integration". Amazingly though, the Sherman antitrust act is silent about "tying", "product" and "integration", and just utters a delphic and contradictory ban on "contracts ...in restraint of trade". We can ask the same questions about "exclusive dealing", for

[5] United States v. Microsoft, 147 F.3d 935 (D.C. Cir. 1998).

how often have we heard about someone getting an "exclusive" in a good business deal? Or since we are all monopolists over what we own, when do we become "monopolists" under the antitrust laws? One might well ask, and citizens who are not judges surely might ask, how do we divine an antitrust violation in an otherwise everyday business practices? We respectfully submit that there is no objective answer – even though there must be for the laws to be valid.

The Broader Context

The main statutory provision herein, says only that "Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade" is illegal. 15 U.S.C. §2 (1994). This raises the question of how the above charges such as "tying" (let alone "technological tying") flow from the words of the statute. The fact that the statute does not mention, nor does its history explain, these charges, and the fact that our argument seeks to fundamentally scrutinize the antitrust laws, requires us to ask this Court to first step back to examine the broader context of those laws. Moreover, statutes, like everything, exist in a context and can only be understood in context. Statutes' context begin with their purpose, with the "why" as well as the "what", because the "what" exists only to effectuate the "why".

Judge Bork, an opposing amicus herein whose answers we disagree with, in the past raised a threshold question that is indispensable here:

> "Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law – what are its goals? Everything else follows from the answer we give. Is the antitrust judge to be guided by one value or by several? If by several, how is he to decide cases where a conflict in value arises? Only when the issue of goals has been settled is it possible to frame a coherent body of substantive rules."[6]

We submit that antitrusts' goals are illusive, vague and contradictory, as we will discuss. And, because in any given context some things are more important or essential than others, so hierarchy is an indispensable part of objectivity. Yet as Judge Bork's book showed, antitrust law

[6] R. Bork, "The Antitrust Paradox" (1978) (hereafter "Bork") at 50 (emphasis supplied). Unless otherwise indicated, hereafter, all emphasis is supplied.

lacks clear hierarchy of ends and goals.[7] On our view, this is to be expected: vague, ambiguous and contradictory purposes by nature cannot be put in a hierarchy; coils of fog cannot be ordered. That said, let us examine the context of the statute's ends.

## What Is This Thing Called Antitrust?

Your Honors, suppose a citizen, asked you "what is antitrust?" If laws must be understandable, this is a fair and basic question. For many attorneys or even judges or antitrust lawyers, the question evokes a momentary feeling of panic, of "How can I explain? There are so many elements and aims. I can't even think of a way to integrate them and say what the essence or sum or definition of 'antitrust' is." Could you explain in even 500 words or less? If you had such a reaction, it would not reflect poorly on you, for we will quote a range of commentary from Supreme Court Justices to law and economics professors, revealing that antitrust law is a chameleon if not a chimera.

Or, let us ask essentially the same question from a different perspective, a citizen's. For example, the Federal Trade Commission Act, kin to the Sherman act, prohibits "unfair methods of competition".[8] Suppose you are an average American at work at a business, and a policeman or bureaucrat arrives and declares "don't be unfair, or beware." Would you consider you had fair notice of what to do, or not, or what the sanction?[9] We argue that the Sherman act's terms are

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[7] Bork's solution, not uncommon in antitrust, that social "efficiency" is the ultimate standard, is wrong because our individual rights are – individual. Judge Bork simply takes it for granted that individual property rights may be sacrificed to supposed social "efficiency" and evaluated ex post facto by judges and economists. But Americans are not interchangeable social units of a collective. Nor are their values, expressed in their preferences in economic transactions, interchangeable or mathematical. E.g., D. Armentano, "Antitrust: The Case for Repeal" at 102 (2d ed. 1999). Nor does our Constitution allow a majority of "society" to tell those whom it deems "inefficient" that their lives and property are the majority's to deal with as it sees fit.

[8] See §5 of the act, 15 U.S.C. §45 (1994).

[9] We submit that the Sherman act and other antitrust statutes should meet the same utter clarity requirements which judges know that their injunctions must satisfy, for the same basic reasons: "Basic fairness requires that those enjoined receive explicit notice of what is outlawed." Schmidt v. Lessard, 414 U.S. 473, 476 (1974); Int'l Longshoremens' Ass'n v. Phila. Marine Tr. Ass'n, 389 U.S. 64 (1967). A party "enjoined" by a statute, no less one enjoined by court order,

just as cloudy and the problem just as acute.

The Chairman of the Federal Reserve Board, Alan Greenspan, has written: "The world of antitrust is reminiscent of Alice's Wonderland: everything seemingly is, yet apparently isn't, simultaneously."[10] And a well known modern Supreme Court Justice (and Chief Justice nominee) Abe Fortas, in the forward to a well-recognized treatise (a treatise which admired the antitrust laws) unblinkingly declares:

> "Antitrust in the United States is not, in the conventional sense, a set of laws by which men may guide their conduct. It is rather a general, sometimes conflicting, statement of articles of faith[11] and economic philosophy, which takes specific form as the courts and governmental agencies apply its generalities to the facts of individual cases in the ideological setting of the time."[12]

Key Statutory Terms are Undefined

The main statutory provision in this case is §1 of the Sherman antitrust act, which makes illegal "Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade." But our Supreme Court, in a landmark antitrust decision, by Chief Justice White, unabashedly admitted "the absence of any definition of restraint of trade as used in the statute," Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 63 (1911).[13] Likewise, the pro-antitrust

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should "be able to ascertain from the four corners" of the order or statute "precisely what acts are forbidden", cf. Sanders v. Airline Pilots Ass'n Int'l, 473 F.2d 244, 247 (2d Cir. 1972). As we will argue, infra, the antitrust laws are unconstitutionally "void for vagueness" and so non-objective and arbitrary as to violate Due Process of law guarantees.

[10] A. Greenspan, "Antitrust", reprinted in "Capitalism: The Unknown Ideal" (1966) at 56.

[11] If antitrust is "an article of faith" we must note that faith is not reason, and that faith, a universal feature of religion, is properly exiled from politics and law by the 1st Amendment.

[12] A.D. Neale, "The Antitrust Laws of the U.S.A.: A Study of Competition Enforced by Law", The National Institute of Economic and Social Research and the Cambridge University Press (1966) (hereafter "Neale") at v. As to Neale's subtitle, as philosopher Ayn Rand succinctly observed, "The concept of free competition enforced by law is a grotesque contradiction in terms. It means: forcing people to be free at the point of a gun. It means: protecting people's freedom by the arbitrary rule of unanswerable bureaucratic edicts." A. Rand, "America's Persecuted Minority: Big Business", reprinted in "Capitalism: The Unknown Ideal" supra at 46.

[13] Chief Justice White reiterated that restraint of trade was statutorily undefined, in United States v. American Tobacco Co., 221 U.S. 106, 179 (1911).

Neale treatise is compelled to conclude that "[t]hus, where antitrust is concerned, nothing less than the whole body of case law constitutes the definition of [the forbidden practice] 'restraint of trade'." Id. at 12. If this is the "rule of law", recently appealed to after our election, most Americans would be properly startled by that notion.

Many people believe that the antitrust act is "about competition". But if, adopting that perception, we took the statutory phrase "restraint of trade" to mean restricting "competition", we would run into Justice Holmes' strenuous objection early in antitrust's history that:

> "Much trouble is made by substituting other phrases assumed to be equivalent, which then are reasoned from as if they were in the Act. The Court below argued as if maintaining competition were the expressed object of the Act. The act says nothing about competition. I stick to the exact words used."[14]

Even if "competition" were in the Sherman act, Professor Neale points out, "it would be found that the notion of preventing competition had to be further defined in its turn and this would raise difficult questions of degree and intention. What is the position, for example, if some types of business behavior (or structure) limit competition in one way, but increase it in another?" Neale at 13. That very valid question lacks a valid answer, for the Supreme Court itself has confessed "inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another."[15] It is thus a fair comparison to describe the antitrust laws in the Churchillian phrase, a mystery wrapped in an enigma.

And so Prof. Neale concludes: "No broad definition can really unlock the meaning of the statute", Neale at 13, telling the reader to study the whole case law as a first step. In what other realm of American law, particularly with criminal and other heavily penal features, do we tell citizens that the law is nothing less than millions of pages requiring lawyers to interpret? None that amicus curiae are aware of, certainly none which by effecting every business act touches almost every act in every citizen's life. As philosopher Ayn Rand aptly summarized the problem,

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[14] Northern Securities Co. v. United States, 193 U.S. 197, 403 (1904).

[15] See United States v. Topco Associates, Inc, 405 U.S.596, 609 (1972) and 13-14 infra.

> "No two jurists can agree on the meaning and application of these laws. No one can give an exact definition of what constitutes 'restraint of trade' or 'intent to monopolize' or any of the other, similar 'crimes.' No one can tell what the law forbids or permits one to do. The interpretation is entirely left to the courts."[16]

The Supreme Court Saw the Problem, But its "Rule of Reason" Cure Is "A Sea of Doubt"

As stated earlier, §1 of the Sherman act cryptically makes illegal "Every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade," 15 U.S.C. §1 (1994). But as the Supreme Court famously observed, all contracts "restrain trade" in the sense that "to bind, to restrain is their very essence"[17]. It is a well-known feature of antitrust history that the act was at first held to bar all "restraints of trade" as per its words but, years later, finding the scope of the statute thus construed unworkable, the Supreme Court literally inserted judicially the term "unreasonable" into the phrase "restraint of trade", albeit over strong dissent. Originally, the Supreme Court had held that "no exception or limitation [such as reasonable] can be added without placing in the act that which has been omitted by Congress."[18] But, concluding that the Sherman act otherwise lacked a standard, the Supreme Court decided in the Standard Oil case that: "as the contracts or acts embraced in the provision were not defined ... being broad enough to embrace every conceivable contract or combination... it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard should be resorted to"[19] to judge the conduct in question.

Yet injecting the term "reasonable" just raises more questions. As then-Judge Taft warned before ascending to the Supreme Court, to read into the statute the term "reasonable" was to "set sail on a sea of doubt," United States v. Addyston Pipe & Steel Co., 85 F. 271, 284 (6th Cir. 1898), aff'd 175 U.S. 211 (1899). We submit that judge Taft was right: the undefined term

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[16] A. Rand, "Antitrust: the Rule of Unreason (1962), reprinted in L. Peikoff (ed.), "The Voice of Reason" (1990) at 255.

[17] Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).

[18] Unites States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 328 (1897).

[19] Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 60 (1911).

"reasonable" was and is an illusory standard, literally an invitation to future "judicial legislation" while the law wis left with a key term unknowable by citizens in advance; the so-called "Rule of Reason", we submit, added a mere illusion of objectivity, to the admittedly undefined statute. In fact that made the act more subjective, as Prof. Neale concluded, "the so-called Rule of Reason... the guiding principle of Sherman act construction, is as difficult to define at the outset as 'restraint of trade' and for much the same reasons." Neale at 13-14. Given that fact, the Sherman act's central prohibition on "restraint of trade" is but a naked and arbitrary restraint of rights. It is not what citizens think of as simply a matter of just "enforcing laws on the books", as if "monopolization" was as clear an offense as running a red light. To paraphrase the fable, we respectfully submit that the Sherman act, the Emperor of antitrust, has no clothes.

With contradictory statements of the statute's ends, with not even an attempt at hierarchy to rank the vague and the contradictory "policies" of antitrust, it is impossible to say what is "reasonable". The Supreme Court believed that merely saying "reasonable" was the standard. But one cannot avoid asking: Reasonable" by what standard? Doubtless, as Judges, Your Honors know from your everyday work that reason is a faculty which operates on content, it judges by measuring facts against a standard, as judges do daily. There can be no such thing as "reasonable" by no standard. Again, we are thrown back upon endless judicial, case-by-case, interpretations, not to mention upon the uncertainty of unborn rulings to come. Hence one can and must again ask what antitrust means, and lacking an answer doubt its validity.

Nor Was the Next "Solution", Per Se Illegality Rules, any Cure

Perhaps disoriented from sailing on the "sea of doubt" of the so-called "Rule of Reason", the courts sought shelter in what are called "per se" rules, rules which define certain descriptive categories of conduct (e.g., "boycott", or "price-fixing") that will simply be presumed conclusively by judges to be per se unreasonable and unlawful. Of course, these pigeonholes are simply not found in the statute, immediately raising the question of the legitimacy of such

"judicial legislation", indeed as early and even more recent Supreme Court opinions did.[20]

But another threshold problem is defining these non-statutory per se categories. Consider one of the supposedly "bedrock" per se antitrust prohibitions, "price fixing". One of the leading sponsors of the Sherman act, Senator Hoar, was reported to have advised manufacturers that a "price fixing" and profit agreement they felt would avoid "destructive competition" would not violate the act. Neale at 26 n.2. Most, but not all, courts later ruled otherwise. Then, when a case reached the Supreme Court arguing that fixing a price ceiling might actually benefit "competition" and the consumers that antitrust was said to serve, the Court decision declined even to consider such defense. Albrecht v. Herald Co., 390 U.S. 145 (1968). Yet recently, the Court declared that new learning has somehow revealed that this per se ban on maximum price-fixing was to be lifted from a statute that never contained any terms referring to price fixing, by a Court that had once read such terms into the statute. State Oil Co. v. Khan, 522 U.S. 3 (1997).

Another prime example of even per se rules' shifting sands is a seminal case in which literal price fixing was pronounced not price fixing in an antitrust sense because the Court decided it was excused by the Court's feelings as to the perceived convenience of trade. In the Chicago Board of Trade v. United States, 246 U.S. 231 (1918), the government argued that it was clearly price-fixing for a trade exchange rule to compel members to make all trades after hours only at the end-of-day price. Such "price-fixing", supposed to be per se illegal, was excused because the Court felt the restraint of trade "merely regulates competition and perhaps thereby promotes competition." Id. at 238. Is "merely regulates competition" a workable legal test judges can honestly employ? With no disrespect to Justice Brandeis, isn't this core antitrust rule more rationalization[21] than rationale?

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[20] Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 89, 100 (1911); United States v. Topco Associates, Inc, 405 U.S.596, 611-12 (1972).

[21] As early as 1965, antitrust "rationalization" provoked scholarly comment: "When the anti-efficiency impact of the law is occasionally perceived,... the social purpose of the antitrust laws is called upon to provide a rationalization." R. Bork and W. Bowman, "The Crisis in Antitrust", 65 Colum. L. Rev. 363-369 (1965). The authors also concluded that "When the

Let us now look at the per se doctrine with an example from what is fittingly called "An Antitrust Kaleidoscope", in a recognized casebook[22] written by a famous antitrust scholar and practitioner, Milton Handler and others including a Federal Trade Commission Chairman Pitofsky, a casebook used in countless law schools. The casebook asks "How much guidance as to what constitutes a 'restraint of trade' do the courts receive from 1 of the Sherman Act?" based upon a summary of United States v. Topco Associates, Inc, 405 U.S.596 (1972). In Topco, a cooperative association of small and medium-sized regional markets joined to be able to economically offer "private label" brands of quality merchandise to compete with large supermarket chains; in so doing, exclusive distribution territories were assigned, without which Topco argued it could not maintain the association. The government contended that such territories were per se illegal under the alleged category of "horizontal" territorial divisions among competitors. The trial court, hearing evidence, found that the practice in fact promoted competition. Wasn't this practice, which a trial court concluded was proven to be "pro-competitive", then one that "merely regulates and perhaps thereby promotes competition" rather than per se illegal, to recall Justice Brandeis' famous words?

The Supreme Court reversed the trial court. The Court refused "to ramble through the wilds of economic theory", id. at 609 n. 10, even to judge economic conduct against a statute commonly understood to be about economic competition. The Court explained that

> "Whether or not we would decide this case the same way under the rule of reason... is irrelevant.... The fact is that courts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another is one important reason we have formulated per se rules."

Id. at 609. And the Court made no bones about antitrust being a departure from free enterprise, effected by judicial lawmaking that was not properly done by courts but by Congress:

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person whose conduct is to be judged is in doubt concerning which of two completely contradictory policies will be applied, the system hardly deserves the name of law." Id.

[22] M. Handler, H. Blake, R. Pitofsky, and H. Goldschmid, "Trade Regulation: Case and Materials", Chapter 1 Section 1D (1975 ed.).

> "There have been tremendous departures from the notion of a free-enterprise system as it was originally conceived in this country.... If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this too is a decision that must be made by Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions and courts are ill-equipped and ill-situated for such decision making. To analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required." Id. at 611-12.

Perhaps heedless of its own warning, the Court then established what the Chief Justice's dissent called a new per se category of illegal acts, id. at 614.

On that day, the Supreme Court confessed that courts cannot meaningfully measure destructions of competition, and a defendant may face per se illegality accusations, depending on into what pigeonhole the courts defines his general business practice into, with no consideration in a per se case of the actual effects on "consumers" or "competition" that the defendant could prove at his trial. The phrase "individual justice" is thus torn asunder for some defendants. On other days and in other cases, depending on nothing in the statute, the Court demands that trial courts under the so-called "rule of reason", somehow, weigh competition, without setting any units of measure necessary for any weighing. Such "weighing" is impossible, and this crazy-quilt regime of per se and competition weighing, we submit, is not law but lawlessness.

Antitrust is Truly At War With Itself

As an opposing amicus (Judge Bork) wrote in his book, "The Antitrust Paradox", "antitrusts' basic premises are mutually incompatible, and because some of them are incorrect, the law has been producing bizarre results. Certain of its doctrines preserve competition, while others suppress it, resulting in a policy at war with itself." Bork supra at 7.

Space does not permit a catalog of antitrust internal contradictions and twists and labyrinthine turns superimposed by jurists mightily struggling to do their jobs. Antitrust lawyers – and this experienced Court – will doubtless be able to call up a host of their own examples. But this raises one of the worst aspects of non-objective law like antitrust: that it makes even honest

judges', not to mention less than scrupulous bureaucrats', jobs impossible, because it makes it their task to make the contradictory "work", somehow.

Again, to quote more fully what Alan Greenspan concluded:

> "The world of antitrust is reminiscent of Alice's Wonderland: everything seemingly is, yet apparently isn't, simultaneously. It is a world in which competition is lauded as the basic axiom and guiding principle, yet 'too much' competition is condemned as 'cutthroat.' It is a world in which actions designed to limit competition are branded as criminal when taken by businessmen, yet praised as 'enlightened' when initiated by the government. It is a world in which the law is so vague that businessmen have no way of knowing whether specific actions will be declared illegal until they hear the judge's verdict -- after the fact."
>
> "In view of the confusion, contradictions, and legalistic hairsplitting which characterize the realm of antitrust, I submit that the entire antitrust system must be opened for review."

We agree with Mr. Greenspan, an on review, submit that the antitrust nightmare must one day be put to an overdue end, if not all at once, as cases such as this present particular flaws in the law.

Antitrust is Anti-Rights, and is Abhorrent to Our Republican Form of Government

The clashes between the antitrust laws and individual rights are legion because antitrust is thoroughly arbitrary and non-objective law, in form and in content.[23] And as shown above, the Supreme Court frankly admitted that antitrust is a "tremendous departure" from the Founders' free enterprise system. Topco, supra at 611-12. But because Americans are not ruled, we are proudly described as "a government of laws and not of men." As the Supreme Court unanimously explained:

> "The historic phrase 'a government of laws and not of men' epitomizes the distinguishing character of our political society. When John Adams put that phrase into the Massachusetts Declaration of Rights he was not indulging in a rhetorical flourish. He was expressing the aim of those who, with him, framed the Declaration of Independence and founded the Republic….[T]he Founders knew that law alone saves a society from being rent by internecine strife or ruled by mere brute power however disguised." Cooper v. Aaron, 358 U.S. 1 (1958).

Yet antitrust and any non-objective or arbitrary law inevitably and impermissibly inverts this principle, creating a government of laws and not of men, ripe for abuse and oppression, not

[23] Antitrust violates rights by its form no less than in substance, as we will show, but the former violations are simply one step more indirect.

only by power-seekers but even through unintentional wrongs by the most honest judges.[24]

The worst case scenario is easy to describe and just as chilling to ponder, especially because tyranny is not always an all or nothing affair, by coup rather than by creep.

> "It is a grave error to suppose that a dictatorship rules a nation by means of strict, rigid laws which are obeyed and enforced with rigorous, military precision. Such a rule would be evil, but almost bearable: men could endure the harshest edicts, provided these edicts were known, specific and stable; it is not the known that break's mens' spirits, but the unpredictable. A dictatorship has to be capricious; it has to rule by means of the unexpected, the incomprehensible, the wantonly irrational; ... a state of chronic uncertainty is what men are psychologically unable to bear."[25]

Further,

> "The Antitrust laws give the government the power to prosecute and convict any business concern in the country any time it chooses. The threat of sudden destruction, of unpredictable retaliation for unnamed offenses, is a much more potent means of enslavement than explicit dictatorial laws. It demands more than mere obedience; it leaves men no policy save one: to please the authorities; to please – blindly, uncritically, without standards or principles; to please – in any issue, matter or circumstance, for fear of an unknowable, unprovable vengeance. Anyone possessing such a stranglehold on businessmen possesses a stranglehold on the wealth and the material resources of the country, which means: a stranglehold on the country." Id.

Hence, at the hands of those who enjoy power, antitrust is a perfect tool of legalized terrorism. But, again, no dictator is required for abuse, for the tyranny of non-objective law is built in. Faced with a non-objective law, without unambiguous, non-contradictory definitions, and ends, even an honest judge cannot be objective. Finally, what is worse is another inbuilt tendency, that of precedent to gradually exaggerate any flaw in the law, as the rich context of the original reasons and standards gradually seep out by repeated excerpting of precedent, because what is held implicitly but not fully consciously cannot be real food for thought and analysis. The bad in precedent, more and more quoted but unexamined, deteriorates further.

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[24] Cf. the remark of a District Judge to the government prosecutor made in objecting to the Microsoft consent decree, a remark which supported his recusal by this Court: "you don't have to have a case", United States v. Microsoft, 56 F.3d 1448, 1463 (D.C. Cir. 1995).

[25] A. Rand, "Antitrust: the Rule of Unreason (1962), reprinted in L. Peikoff (ed.), "The Voice of Reason" (1990) at 254.

Antitrust Laws are Constitutionally "Void for Vagueness"

Since ancient times, when men condemned a tyrant's laws placed atop a tall pillar, inaccessible and unreadable, men have rightly demanded to know the law. If, as is proper, ignorance of the law is no excuse, then a crucial obligation of government is to see that the laws must be eminently comprehensible to the country's citizens. This principle is embodied in many forms in our Constitution and in Anglo-Saxon jurisprudence. In one form it is expressed in the constitutional doctrine of striking down laws as "void for vagueness", in another in the constitutional doctrine striking down ex post facto law. For "[a]n undefinable law is not a law, but merely a license for some men to rule others."[26]

The Supreme Court has repeatedly and properly voided certain laws under the "void for vagueness" doctrine, among them laws forbidding "loitering" and "vagrancy".[27] Civil, as well as criminal statutes are stricken as vague. A.B. Small Co. v. American Sugar Ref. Co., 267 U.S. 233, 239 (1925). As a recent example, in Chicago v. Morales, 527 U.S. 41 (1999), the Supreme Court, struck down a loitering law even though, as the Illinois Supreme Court had found, "loitering" had some common and accepted meaning. Yet both "loitering" and "vagrancy" have a good degree of meaning to the average person -- unlike the complexities of antitrust law – and were the terms were explained in many judicial precedents over the years – indeed, for more hundreds of years than the Sherman act. Nonetheless, the Supreme Court did not even consider saying that those accused under these laws should have consulted lawyers or numerous precedents, as we compel antitrust defendants to do.

Last term, the High Court reminded us of the that the void for vagueness test has a second important prong: "A statute can be impermissibly vague for either of two independent reasons. First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand

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[26] A. Rand, "Vast Quicksands", The Objectivist Newsletter, July 1963 at 25.

[27] E.g., Papachristou v. Jacksonville, 405 U.S. 156 (1972)(vagrancy); Kolender v. Lawson, 461 U.S. 352 (loitering).

what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement." Hill v. Colorado, ___ U.S. ___, 120 S. Ct. 2480 (2000). Actually, these prongs are just two sides of the same coin, but when law is at the arbitrary end of the vagueness spectrum as antitrust is, arbitrary enforcement follows inexorably because the arbitrary can only be enforced arbitrarily. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis," Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972). As we have indicated, the antitrust laws are not merely "vague" but contradictory in goal and precedent, subjective and ad hoc; as such, their enforcement necessarily is "arbitrary and discriminatory" and runs afoul of this vital Constitutional standard. An arbitrary "law" is no law at all. Gulf, Colo. & Sante Fe Ry. Co. v. Ellis, 165 U.S. 150, 155 (1897).[28]

Antitrust is Unconstitutional Ex Post Facto Law

For these reasons, that the law must be knowable in advance, we abhor retroactive law.

> "Retroactive (or ex post facto) law – i.e., a law that punishes a man for an action which was not legally defined as a crime at the time he committed it – is rejected by and contrary to the entire tradition of Anglo-Saxon jurisprudence. It is a form of persecution practiced only in dictatorships and forbidden by every civilized code of law. It is specifically forbidden by the United States Constitution. It is not supposed to exist in the United States and it is not applied to anyone – except to businessmen. A case in which a man cannot know until he is convicted whether the action he took in the past was legal or illegal, is certainly a case of retroactive law."[29]

Ex Post Facto law is such an evil that it was prohibited in the original Constitution, prior to the Bill of Rights' promulgation, in two places, as against federal and state governments alike. "No ... ex post facto law shall be passed," by Congress (Art. I §9), and "No State shall... pass

[28] Nor is dicta in Nash v. United States, 229 U.S. 373 (1913), a bar to our argument. As we argue, the antitrust laws have grown significantly more vague and infirm in the ninety years since Nash was decided.

[29] A. Rand, "America's Persecuted Minority: Big Business", reprinted in "Capitalism: The Unknown Ideal" supra at 43-44.

any... ex post facto law or law impairing the Obligation of Contracts," (Art. I §10)[30] While our Supreme Court in Calder v. Bull, 3 U.S. 386, 390 (1798) construed ex post facto to apply only to criminal and penal statutes, the latter were referred to broadly as any involving "pain or penalties", id., and we submit that the antitrust laws fall within the clause's ban, for they have a criminal dimension and penalties, and their ruinous treble-damages liability provisions are punitive damage provisions, penal in nature. Indeed, the Supreme Court later reaffirmed that Calder was not to be make the ban easily evaded by giving civil form to a measure which is essentially criminal, Burgess v. Salmon, 97 U.S. 381 (1878). As with the antitrust laws, the tax law in Burgess was both civil and criminal but the penalty struck down was civil.

Finally, most notably, it cannot be forgotten that one essential basis of Calder is that the other constitutional provisions amply protected against deprivations worked by retrospective civil law. Carmell v. Texas, 529 U.S. 513, 519 (2000). Several Justices in Calder took it for granted that retrospective civil law unconstitutionally impair the obligation of contracts, as we argue, or that such law would be a "taking" for which just compensation must be offered, as we argue.[31]

Antitrust Offends the 6th Amendment

Unknowable laws such as antitrust likewise offend the 6th Amendment to the Constitution, which guarantees that "In all criminal prosecutions, the accused shall enjoy the right... to be informed of the nature and cause of the accusation", id. A statute with undefined

[30] The States' antitrust laws also offend the Contract Clause, putting arbitrary prohibitions in the way of freely agreed contracts between citizens; in fact, by imposing 50 not necessarily consistent non-objective laws, the state statutes impede the free flow of interstate commerce envisioned by Art. I §8 of the Constitution. Moreover, Sherman act §6 authorizes massive forfeiture of goods, surely a "taking"; the Supreme Court recently reemphasized that economic regulation can constitute a taking. Eastern Enterprises v. Apfel, 524 U.S. 498, 523 (1998) quoting Calder: "'It is against all reason and Justice' to presume that the legislature has been entrusted with the power to enact 'a law that takes property from A. and gives it to B'". And Calder reminded that punishment pursuant to ex post facto law was by nature "cruel and unjust", reinforcing our argument that antitrust is the corporate equivalent of a "cruel and unusual" punishment under the 8th Amendment. See Carmell v. Texas, 529 U.S. 513 (2000).

[31] Insofar as §6 of the Sherman act, 15 U.S.C. §6, authorizes seizure and forfeiture of any property owned under any violative contract, combination or conspiracy when in interstate transit, it sanctions "unreasonable searches and seizures" forbidden by the 4th Amendment.

prohibitions, like the Sherman act, "clarified" only with the use of a vast number of legal case precedents, rules subject to sudden change, could never be explain adequately to an accused the nature of the accusation. Nor can a statute, again "overlaid" with libraries full of changing precedent, which names varying and contradictory aims and standards served by the statute, ever explain adequately to an accused the cause of the accusation. Here again, inasmuch as the Sherman act is both criminal as well as civil, this vital Constitutional guarantee must be honored, we respectfully submit, not only for its spirit but as another part of Due Process of Law.

Antitrust Offends Due Process of Law

The sum and substance of these grievous faults in antitrust's non-objective form is denial of Due Process of Law under the 5th and 14th Amendments to the Constitution, and results in taking without just compensation barred by the 5th Amendment, regardless of whether one interprets due process provisions as "substantive" or "procedural".[32] Where there is no "law", there can be no due process of law. Note, too, that form and substance can be separated for analysis only: in reality and in effect, these violations of individual rights, even when "procedural" in form, violate the fundamental "substantive" rights of life, liberty, and property.

Antitrust "Judicial Lawmaking" Violates the Constitutions' Separation of Powers Rule

One of the fundamental acts of the Supreme Court, inserting the term "unreasonable" into the Sherman act, discussed above, was correctly declared impermissible "judicial legislation" by Justice Harlan's dissent. Standard Oil, supra, 221 U.S. 1, 89, 100 (1911). By the same logic, judicially creating per se violations is improper. "'Judicial construction' is thus one method of exercising arbitrary power."[33] We again submit that even honest judges may be led to exercise what is in effect arbitrary power trying to follow by non-objective law. From what been said, it is

[32] With respect to this Constitutional provision or others which apply in principle and in spirit, but may not squarely apply under current law, We respectfully submit that the cumulative effect of such violations of our nation's basic principles can add up to an actual violation of the Due Process of law guarantees of our Bill of Rights. The presumption should be in favor of rights and against any violation of them, as mandated by the 9th Amendment.

[33] A. Rand, "Thought Control", The Ayn Rand Letter, V. II #26 (9/24/73) at 2.

obvious that, as Judge Bork once posed the right question – because antitrust is "law primarily made by judges....At issue is the question central to democratic society: Who governs?" Bork supra at 10. Judicial legislation endemic to an entire legal field, such as antitrust, makes an elected Congress vestigial. Separation of Powers, a cornerstone of our form of government, is inevitably destroyed by non-objective law whose gravitational pull breeds improper "judicial legislation"[34] by the non-legislative, unelected branch.

James Madison, echoing Montesquieu, said: "No political truth is of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty," and "Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator."[35] And the Massachusetts Bill of Rights said: "the judicial [department] shall never exercise the legislative and executive powers, or either of them, to the end it may be a government of laws and not of men." Art. XX (1780).

Antitrust Steals the Equal Protection of the Laws from Businessmen

Antitrust is arbitrary law aimed at businessmen, as such it subjects businessmen, in the conduct of what was once (and should be again) considered the rightful pursuit of their lawful occupation, to use the terms of the Privileges and Immunities Clause of the Constitution.[36] Instead, §2 of the Sherman act, in this case allegedly prohibiting Microsoft's "maintenance" of a "monopoly" or its attempt to attain it, works a particular deprivation of Equal protection. For the act mentions "monopoly", but never defines it, never states whether mere possession of such status is unlawful, and never states what standards apply to an "attempt" to obtain it.

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[34] See, e.g., Miller v. French, 530 U.S. 628 (2000)(Separation of Powers prevents one branch from encroaching on the central prerogatives of another); United States v. Nat'l Treasury Employees' Union, 513 U.S. 454 (1995) (Courts' obligation to avoid judicial legislation). "Liberty is always at stake when one or more of the branches seek to transgress the separartionof powers." Clinton v. City of New York, 524 U.S. 417, 450 (1998)(Kennedy, J., concurring).

[35] The Federalist No. 47 (Earle ed.), Modern Library 313-15.

[36] Saenz v. Roe, 526 U.S. 489 and 521 (dissent) (1999). A clause embracing the right to travel, a fortiori should protect the right to work in a lawful occupation, to property, and to life.

In practice, defendant's "share" of a so-called "relevant market" is examined, as if the total "pie" was static and competitors are entitled to some "share" which is somehow "theirs" share. Microsoft's "market share" is just a result of the its producing and trading its own property. Why a "share", never static in the real world, can be looked at, or whether asking what is the "relevant" market commits the fallacy of begging the question, is never answered. Indeed, it may be the dirty secret of antitrust that convincing a judge what market "definition" is "relevant" wins the case: one picks some area in which defendant has a very high percentage "share" by some measure. Why, for example, in this case, isn't the "relevant market" in this case "all computer operating systems"? To this question there can be no objective answer. As with "restraint of trade" and the "rule of reason", these terms and questions are not defined under the act – not by anything short of a study of numberless case-by-case precedents, as Prof. Neale concluded. And since "relevant market" thus determined cannot be known before a trial[37], how is a "monopolist" to know he is one or when he must behave differently, except ex post facto? What this boils down to here, is that Microsoft is held to be "too successful" and that after the mysterious and unknowable moment when it became "too successful" it strove for further success rather than renunciation and self-sacrifice.[38]

If one doubts that antitrust law is anti-ability and anti-success law, consider one of the most famous "monopoly" case rulings by a well-known jurist, Judge Learned Hand pronouncing the supposed sin of the Alcoa Corporation:

> "It was not inevitable that it [ALCOA] should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists

[37] Not only would a businessman not know what economists, lawyers and judges would later use as a market definition, but knowing his "share" also requires knowing the competitors' information, which information cannot be known for sure inasmuch as competitors are unlikely to reveal it, or if they do, sharing it may be an antitrust violation in itself. United States v. Container Corp. of America, 393 U.S. 333 (169).

[38] Because the legality of Microsoft's alleged exclusive dealing also depends on Microsoft's "market power", on whether Microsoft has been "too successful" in a given area, that claim under Sherman act §1 too deprives Microsoft of Equal Protection of the Laws.

> that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel." United States v. Alcoa, 148 F.2d 416, 431 (2d Cir. 1945).

Therefore, we submit that philosopher Ayn Rand was right when she concluded: "[There is only one] meaning and purpose these laws could have, whether their authors intended it or not: the penalizing of ability for being ability, the penalizing of success for being success, and the sacrifice of productive genius to the demands of envious mediocrity."[39] Founding Father and later President John Adams wrote that "it must be remembered, that the rich are people as well as the poor; that they have rights as well as others; that they have as clear and as sacred a right to their large property as others have to theirs which is smaller; that oppression to them is as possible and as wicked as to others."[40] So too for the able and successful.

Antitrust Offends our Republican Form of Government and the Ninth Amendment

Law also must be knowable and known because of the respective functions of rights and government in America. Our government is not the "Ruler" of American citizenry but its Servant. As our Declaration of Independence unforgettably put it: "that [men] are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. – That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed." In Founder Samuel Adams' words, "the grand end of civil government, from the very nature of the its institution, is for the support, protection and defence of those very rights."[41] Indeed the 9th Amendment to our Constitution plainly stands as a monument to this Republican principle, that we are free, and retain rights,

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[39] A. Rand, "America's Persecuted Minority: Big Business", reprinted in "Capitalism: The Unknown Ideal" at 57 (1966).

[40] J. Adams, "Defence of the Constitutions of Government of the United States" (1787), reprinted at "http://press-pubs.uchicago.edu/founders/documents/v1ch11s10.html", The University of Chicago Press (2000).

[41] S. Adams, "The Rights of the Colonists" (1772), reprinted at "http://press-pubs.uchicago.edu/founders/documents/amendIXs3.html", U. Chi. Press (2000).

with only strictly delimited and defined exceptions: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[42]

Ayn Rand explained:

> "Under a proper social system, a private individual is legally free to take any action he pleases (so long as he does not violate the rights of others), while a government official is bound by the law in his every official act. A private individual may do anything except that which is legally forbidden; a government official may do nothing except that which is legally permitted.....This is the means of subordinating 'might' to 'right'. This is the American concept of 'a government of laws and not of men.'" A. Rand, "The Nature of Government", in "Capitalism: The Unknown Ideal" at 298.

Non-objective antitrust law improperly throws a cloud over each citizen's reservoir of rights, denying and disparaging them in violation of the 9th Amendment.

## CONCLUSION

As the New Hampshire State Constitution declared: "All men have certain natural, essential, and inherent rights – among which are the enjoying and defending life and liberty; acquiring, possessing, and protecting property; and in a word, of seeking and obtaining happiness."[43] Ayn Rand explained the philosophic basis for these basic American Constitutional rights:

> "[M]an has to work and produce in order to support his life. He has to support his life by his own effort and by the guidance of his own mind. If he cannot dispose of the product of his effort, he cannot dispose of his effort; if he cannot dispose of his effort, he cannot dispose of his life. Without property rights, no other rights can be practiced.....The right to life is the source of all rights – and the right to property is their only implementation. Without property rights, no other rights are possible. Since man has to sustain his life by his own effort, the man who has no

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[42] For this fundamental reason, and under the 9th Amendment, we submit that the presumption against "facial" invalidity of a statute is an inversion. As the Supreme Court recently noted in Saenz v. Roe, 526 U.S. 489 (1999), the structure of the legislative power and the limits of the bill of rights limit the power to legislate. Government must properly bear the burden of justifying the Constitutional validity of its laws. The Constitution, and our rights, are too important for the rule to be otherwise.

[43] In "Article 2d. Natural Rights". And as a key portion of the famous quote from Adam Smith, is almost always omitted, dropping context; Smith wrote that tradesmen often met and discussed agreements to raise prices, but continued: "It is impossible, indeed, to prevent such meetings, by any law which either could be executed, or would be consistent with liberty and justice." A. Smith, "The Wealth of Nations", quoted in Armentano, supra at v.

> right to the product of his effort has no means to sustain his life. The man who produces while others dispose of his product, is a slave."[44]

Hence we must ask:

> "Is man a sovereign individual who owns his own person, his mind, his life, his work and its products – or is he the property of the tribe (the state, the society, the collective) that may dispose of him in any way it pleases, that may dictate his convictions, prescribe the course of his life, control his work and expropriate its products? Does man have the right to exist for his own sake – or is he born in bondage, as an indentured servant who must keep buying his life by serving the tribe but can never acquire it free and clear?"[45]

We respectfully submit that Americans have known the answer since our Declaration of Independence, and since slaves were emancipated. These are the principles to which America should return. In the face of these vital rights, and the fundamental constitutional infirmities of the antitrust laws, your Honors must not sanction the destruction of the world's most successful company (in market capitalization), under the false banner of that paradigm of non-objective law, that gargantuan judicial and political rationalization, that arbitrary anti-rights regime bearing the misnomer antitrust "law".

November 23, 2000

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[44] A. Rand, "What is Capitalism?", in"Capitalism: The Unknown Ideal" supra at 10.

[45] A. Rand, "What is Capitalism?", in"Capitalism: The Unknown Ideal" supra at 11.